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Supreme Court, U.S.
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No. 02 -

In The

Supreme Court of the United States

Tod N. Rockefeller
Petitioner,
v.
SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE),
Respondent.

On Appeal to the United States Court of Appeals for the Tenth Circuit

---

PETITION FOR WRIT OF CERTIORARI

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33 pp

Questions Presented

1. Whether this Court will set aside a judgment that is clearly demonstrated to be an abuse of discretion ?

2. Whether members of the Judicial Branch can freely disregard the laws and Constitution of the United States ?

3. Whether the legislature's amendment of 28 U.S.C. § 1254 in 1988, eliminating the right of direct appeal to this Court, is invalid and unconstitutional ?

4. Whether it is the policy of the Judicial Branch to revoke the Constitutional rights of those who sue the United States Department of Energy (" DOE ") ?

Parties Proceeding

Petitioner was plaintiff (01-0399 JP/LCS) and subsequently Appellant to the U.S. CoA for the 10th Cir. (02-2117). Respondent Abraham (henceforth "Defendant"); 10th Cir. Judges Henry, Briscoe, and Murphy (henceforth "Respondents").

Respondents are judges who dismissed the case above. Respondents' contact information is: The Circuit Executive, U.S. 10th Cir., Byron White U.S. Courthouse, 1823 Stout Street, Denver, CO 80257. (303) 844 - 3157

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Rules

Supreme Court ("Sup.Ct.") Rules 10(a), 10(c), 14.1

Jurisdiction

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254 (1). The U.S. CoA for the 10th Cir. denied Petitioner's appeal (02-2117) with an Order filed on FEB 5, 2003.

Constitutional Provisions at Issue

First Amendment Right of Free Speech
Fifth Amendment Right of Due Process of Law
Seventh Amendment Right of Trial by Jury

Statement of the Case

This case involves retaliations taken upon Petitioner by his former employer, the United States Department of Energy ("DOE"). Petitioner is a disabled individual who was employed with the DOE as an Environmental Scientist at the Waste Isolation Pilot Plant ("WIPP") in Southeastern New Mexico. The WIPP is a controversial nuclear waste repository for the disposal of defense program generated transuranic waste. Petitioner is an honest man who takes seriously his professional and moral obligations to protect people and the environment.

When Petitioner began identifying safety deficiencies at WIPP, the DOE engaged in reprisals towards Petitioner. The retaliations against Petitioner culminated in his removal from federal service on 12/10/97 for putative "poor performance". Since his removal, the DOE has blacklisted, harassed, and intimidated Petitioner.

Petitioner filed a complaint in the U.S. District Court, District of New Mexico concerning the DOE's post-employment retaliations, Case no. 01-0399 JP/LCS. In dismissing this case, the district court abused its discretion by suppressing evidence, while allowing no discovery of "relevant" evidence ruled by the Magistrate. The district court also defied the doctrine of *stare decisis* without a hint of justification for doing so. An appeal was filed with the U.S. CoA for the 10th Cir.. The 10th Cir. has affirmed the dismissal of Petitioner's case while failing to recognize or address his pleadings. Petitioner has no wish to be criticizing the Government for whom he was very proud to work for previously. E.g.: Defense Logistics Agency - 5 years.

Argument

Question 1. The district court denied the attempt of Petitioner to file and establish relevant and probative evidence into the record of this case to defend against summary judgment. Said evidence was categorized by the district court as "premature", and Defendant claimed that this evidence would be "cluttering the record." See App.4 at 14, 15 Fed.R.Evid. 201(f) notes that:

> "Judicial notice [of adjudicative facts] may be taken at any stage of the proceeding."

Classification of the adjudicative facts that Petitioner had attempted to introduce as "premature" by the district court was without any doubt an error of law. This Court has ruled that:

> "A district court, by definition, abuses its discretion when it makes an error of law." See *Koon*, 518 U.S. at 100

In addition, the district court denied Petitioner's motion (doc. 20) to file his evidence the very next day after the date of Defendant's response. Petitioner had his motion dismissed several days before he even received the response of Defendant. The district court local rules require that Petitioner had fourteen (14) days to file his reply to Defendant's response. Besides making an error of law and abusing its discretion, the district court also violated Petitioner's due process rights. This Court has also ruled that a "district court's refusal to admit the proffered . . . evidence was a clear abuse of discretion." See *Beech Aircraft Corp.*,

488 U.S. at 172. There are additional abuses of discretion that Petitioner will detail below, but he prays that this Court will apply the following ruling towards this instant Petition:

> "Our duty is to . . . uphold the lawful authority of the court without deviation, and yet without hesitancy, where there has been an abuse of discretion, to correct it in the completest way."

See *B&O RR Co.*, 225 U.S. at 325. Petitioner again prays that this Court will apply the ruling above towards this case "without hesitancy" so that he may find justice done.

Petitioner filed the evidence above in response to Defendant's Motion for Summary Judgment ("MfSJ") as the district court had ordered that he could do (doc. 23). Petitioner's evidence consisted of eleven tabbed exhibits totaling 239 pages. The district court and Respondents both refused to consider this evidence that Petitioner specifically linked to his Memorandum in Opposition to the MfSJ. Petitioner had detailed specific averments of retaliations of Defendant including blacklisting (*Cf.* App.4 at 8) and violations of Equal Employment Opportunity ("EEO") law. Defendant failed to deny these specific averments. The silence of Defendant constitutes an adoptive admission per Fed.R.Evid. 801(d)(2)(B). See *Andrus*, 775 F.2d at 839-40. In dismissing Petitioner's appeal, Respondents abused their discretion by failing to evaluate this case "in light of the record viewed in its entirety." See *Cooter & Gell*, 496 U.S. at 400.

Respondents claimed that: "Title VII preempts constitutional claims by federal employees regarding retaliatory discrimination." See page A-4 Petitioner had presented evidence of fact and law clearly detailing that the claim of Respondents above does not apply to his case. E.g.: "when the immunity of a federal entity has been waived, an aggrieved federal employee may sue with a "constitutional tort claim" . . . See *Federal Deposit Insurance Corp.*, 510 U.S. at 472." See App.4 at 11. Respondents have made another error of law in abuse of their discretion.

Next, Respondents claim that Petitioner had failed to explain "why additional discovery was necessary." See page A-6. This is another error of law because the Magistrate had granted Petitioner's "Request for Production Number 4" noting that the request is "relevant to his claims." See page A-18. Respondents have again abused their discretion by dismissing Petitioner's appeal while "facts essential" to his opposition to summary judgment were being withheld by Defendant. See Fed.R.Civ.P. 56(f).

Petitioner had filed a Request for Admissions ("RfA") of the Authenticity of Evidence to defend against the MfSJ. Defendant failed to respond to this RfA "within 30 days after service of the request." See Fed.R.Civ.P. 36 Respondents, again, abused their discretion by claiming that the RfA was untimely. The facts concerning the RfA had been specifically detailed to Respondents. See App.4 at 14, 15. This is another example of how Respondents have ignored the pleadings of Petitioner in a "clearly erroneous assessment of the evidence." See *Cooter & Gell*, 496 U.S. at 405.

Respondents made additional "clearly erroneous" assessments of fact and law concerning

the claims of Petitioner. For example, Respondents state that the discrimination claims of Petitioner must constitute an "adverse employment action" (A-3). This is not consistent with EEO law that Petitioner had noted to include: "allegations of "retaliation" which "are considered to be complaints of discrimination . . ." See 29 CFR 1614.103(a)." App.4 at 9, 10. Allegations of harassment telephone calls and blacklisting in a close temporal link to the protected activity of Petitioner do constitute a claim of "retaliation". Additionally, Respondents also claimed that Petitioner's EEO claims consisted of only mere poor processing of his complaint. This is another "clearly erroneous assessment of the evidence". Defendant had refused to investigate legitimate allegations of retaliation and had improperly dismissed a portion of Petitioner's EEO complaint, among other serious admitted violations. This rises substantially higher than mere poor processing of a complaint. See *Id* Defendant has admitted to refusing to afford Petitioner equal protection of EEO law in violation of his Fifth Amendment constitutional right.

Question 2. Within the body of Petitioner's Opening Brief ("OB") to his appeal to Respondents (02-2117), Petitioner had specifically detailed how the district court had rendered the following laws null and void: 1) 44 USC 1507; 2) 29 CFR 1614.105(g); 3) 29 CFR 1614.103(a); 4) 29 CFR 1614.302(a)(1); 5) 5 CFR 1201.3(b); 6) 5 CFR 1209.4(b); 7) Solid Waste Disposal Act ("SWDA"), 42 USC 6901 et seq.; 8) 1st, 5th, 7th Constitutional Amendment rights. Respondents have stated:

> "We agree with the district court's analysis. Accordingly, we affirm the entry of summary judgment in favor of the Department for substantially the same reasons set forth in the memorandum opinion and order entered by the district court on March 21, 2002." See page A-5

Consequently, Respondents have also rendered the laws above null and void in clear excess of their authority. This Court has ruled:

> "Courts are constituted by authority, and they cannot go beyond the power delegated to them. If they act beyond that authority, and certainly in contravention of it, their judgments and orders are regarded as nullities. They are not voidable, but simply void, and this even prior to reversal. *Elliott v. Peirsol,* 1 Pet. 328, 340; *Old Wayne Life Assn. v. McDonough,* 204 U.S. 8." (quoting *Vallely,* 254 U.S. at 353-54)

Courts have the authority to determine what the law is, and to apply that law. Only the legislature has the power to alter the law; not the courts.

Respondents have exceeded their authority by rendering the law noted above null and void. An example of this is 29 CFR 1614.302 which involves the rights of disabled persons, such as Petitioner, to file "mixed" complaints of discrimination. These "mixed" complaints can include allegations of a "substantial and specific danger to public health" such as what the environmental statutes cover.

The district court and Respondents claim that complaints under the environmental statutes can only be filed with the United States Department of Labor. The district court and Respondents are wrong. They do not have the authority to dispose of law enacted to protect the rights of disabled persons. See App.4 at 8, 9 Respondents have refused to afford Petitioner equal protection of EEO law, and have violated his Fifth Amendment rights. Respondents and the district court have violated their Article VI Oath to "support" the "Constitution". Is not the supervisory power of this Court designed to ensure that the Constitution is supported ? This Court has ruled that: "the supervisory power serves the "twofold" purpose of deterring illegality and protecting judicial integrity." See *Payner*, 447 U.S. 735 n.8; See also *Hasting*, 461 U.S. at 526. Petitioner prays that the Article VI Oath referred to above will be powerfully affirmed by this Court.

Question 3. The Legislature has amended Article III, Section 2 and Article VI of the Constitution, by removing the appellate jurisdiction of this Court from 28 U.S.C. § 1254 via the 1988 Public Law 100-352. Article III, Section 2 requires:

> "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the U.S., .."
> "In all Cases, affecting Ambassadors, . . ., and those in which a State shall be a party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction."

The Legislature's removal of this Court's appellate jurisdiction from Section 1254 has actually amended Article III of the Constitution itself. This "amendment" of the Constitution is invalid for several reasons. First of all is the mechanism by which the Constitution was amended. The U.S. Constitution can NOT be amended by a Public Law. An Amendment can only take place by either a two thirds vote of both houses of Congress, or by a national constitutional convention called by Congress on petition by two thirds of the states. Neither of these two actions took place in the enactment of Pub. L. 100-352.

The second reason that this "amendment" is invalid is because it is not a formal Amendment of the Constitution. Formal Amendments of the Constitution are the only mechanism by which substantial constitutional rights of American citizens may be effected. This has always been so, that is, until 1988 (Pub. L. 100-352).

Elimination of this Court's appellate jurisdiction, from Section 1254, has also caused Petitioner to suffer "direct injury as the result of its enforcement." See *Commonwealth of Mass.*, 262 U.S. at 488. Appendix 6 of this instant Petition is an outline of the admitted constitutional violations and damages inflicted upon Petitioner by the same Defendant concerning Petition No. 01-1143.

> "A federal constitutional issue was properly presented, it was within our appellate jurisdiction . . ., and we had no discretion to refuse adjudication of the case on its merits as would have been true had the case been brought here under our certiorari jurisdiction."

See *Hicks* , 422 U.S. at 344.

Disappearance of the appellate jurisdiction from this Court is unconstitutional for several reasons. First, it violates Article VI by giving Justices of this Court a choice of supporting the Constitution for some litigants, and NOT supporting the Constitution for other litigants. This means that Pub. L. 100-352 has amended the Article VI Oath to always support the Constitution nugatory. Due to the unconstitutional act of the Legislature (Pub.L. 100-352), Petitioner has already suffered constitutional freedom *deminutio* concerning Petition No. 01-1143 with this Court. Petitioner has shown that Pub. L. 100-352 is invalid, and that he has also suffered direct injury as a result of this law to invoke the Power of judicial review. See *Commonwealth of Mass.*, 262 U.S. at 488.

Question 4. During the course of the proceedings leading up to Petition No. 01-1143, Petitioner has suffered the same kind of injustices from the Judicial Branch as detailed within Questions 1 and 2 above. This mistreatment, which began back in 1999, includes:

1) Improper suppression of evidence.
2) Misleading Petitioner as to the admissibility of evidence.
3) Exclusion of relevant evidence filed.
4) Violation of Constitutional rights.
5) Ignoring facts and law within pleadings.
6) Defying the doctrine of *stare decisis* without a hint of justification.

A clear trend has been demonstrated, since 1999 to present, by the Judicial Branch without deviation.

There is little doubt that this Court sets the policy of how law is to be interpreted and practiced by the other federal courts within the Judicial Branch. The injustices that Petitioner has been suffering with for so long have been very specifically pointed out to this Court. These facts certainly warrant corrective supervisory action by this Court.

Prayer for Relief

Due to all of the above, Petitioner prays that this Court grant this instant Petition to review this case on its merits. Also, that judicial review be conducted of the validity and constitutionality of Public Law 100-352.

Respectfully submitted,

s/Tod N. Rockefeller
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APPENDIX 1

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

TOD N. ROCKEFELLER,
Plaintiff-Appellant,

v. No. 02-2117

SPENCER ABRAHAM, in his official capacity as Secretary, United States Department of Energy (DOE), *
Defendant-Appellee.

D.C. No. CIV-01-399-JP
(D.New Mexico)

ORDER AND JUDGMENT

Before HENRY, BRISCOE, and MURPHY, Circuit Judges.

After examining the briefs and appellate record, this panel has determined unanimously that oral argument would not materially assist the determination of these appeal. See Fed.R.App.P 34 (a)(2); 10th Cir. R. 34.1(G). The cases are therefore ordered submitted without oral argument.

Tod N. Rockefeller, proceeding *pro se*, appeals the district court's order granting summary judgement in favor of his former employer, the United States Department of Energy (Department), on each of the claims in his complaint. Our

* This order and judgement is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. The court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th Cir. R. 36.3.

jurisdiction arises under 28 U.S.C. § 1291. We affirm.

Rockefeller was employed by the Department as an environmental specialist. The Department terminated Rockefeller in December 1997 for poor performance. In his complaint in this case,[1] Rockefeller asserted four claims against the Department. First, he claimed the Department violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, by retaliating against him for making public comments about alleged safety violations at the Department. According to Rockefeller, employees of the Department retaliated against him by making harassing phone calls to his home and by blacklisting him from other employment opportunities with the federal government. Second, Rockefeller claimed the Department violated the whistle-blower provisions of the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SWDA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), by blacklisting him from other federal employment opportunities. Third, Rockefeller claimed the Department failed to process his underlying equal employment opportunity complaint in accordance

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1 In a prior case, Rockefeller alleged that the Department wrongfully terminated him because he was disabled and in retaliation for engaging in protected Title VII and whistle-blowing activities. The district court entered summary judgment in favor of the Department, and we affirmed in *Rockefeller v. Abraham*, Nos. 01-2054 & 00-2480, 2001 WL 1434623 (10th Cir. Nov. 15, 2001)(unpublished), *cert. denied*, 535 U.S. 932 (2002).

with the governing federal regulations, see 29 C.F.R. § 1614.101, *et seq.* Fourth, Rockefeller claimed the Department violated his rights under the First, Fifth, and Fourteenth Amendments to the United States Constitution.

The district court concluded that the Department was entitled to summary judgment on each of Rockefeller's claims. With respect to his Title VII retaliation claim, the district court granted summary judgment because: (1) Rockefeller failed to set forth any specific evidence linking the Department to the alleged phone calls or blacklisting; and (2) even if the Department could be linked to the phone calls, the calls did not rise to the level of an adverse employment action since the callers never identified themselves or said anything about Rockefeller's activities vis-a-vis the Department. To support the latter determination, the district court relied on our decision in *Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1178-79 (10th Cir. 1999) (holding that harassing phone calls did not constitute adverse employment action where callers did not identify themselves or mention plaintiff's EEOC claim and where plaintiff presented no evidence that calls were placed by any of defendant's employees with decision-making authority or that management condoned activity).

With respect to Rockefeller's claims under the whistle-blower provisions of TSCA, SWDA, and CERCLA, the district court determined that the Department was entitled to summary judgment because Rockefeller was required under each Act to first exhaust his administrative remedies with the Secretary of Labor, and Rockefeller conceded during oral argument before the district court that he had never filed an administrative complaint

addressing his present whistle-blower claims. In order to provide Rockefeller with an opportunity to exhaust his administrative remedies, the district court dismissed the whistle-blower claims without prejudice.

With respect to Rockefeller's claim that the Department failed to process his administrative complaint in accordance with the governing federal regulations, the district court determined that the Department was entitled to summary judgment because "a violation of a federal regulation governing the handling of [Rockefeller's] EEOC complaint does not create an independent cause of action under Title VII." R., Doc. 58 at 4. To support this determination, the district court relied on our decision in *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991) (holding that there is no private cause of action against Equal Employment Opportunity Commission for misprocessing of discrimination claims asserted against private employer), and the Seventh Circuit's decision in *Jordan v. Summers*, 205 F.3d 337, 342 (7th Cir. 2000) (holding that federal employee could not assert claim under Title VII against equal employment opportunity division of the federal agency that employed her for misprocessing of discrimination and retaliation claims).

Finally, with respect to his claimed constitutional violations, the district court determined that the Department was entitled to summary judgment because: (1) Title VII preempts constitutional claims by federal employees regarding retaliatory discrimination; (2) to the extent Rockefeller was alleging due process violations aside from discrimination, he failed to demonstrate that a genuine issue of material fact

was in dispute; and (3) to the extent Rockefeller was alleging a First Amendment retaliation claim based on his public comments about potential safety violations at the Department, the claim was preempted by the federal whistle-blower statutes. However, because it concluded that his First Amendment claims are closely related to his statutory whistle-blower claims, the court dismissed the First Amendment claims without prejudice.

"We review a district court order granting summary judgment de novo." *Camfield v. City of Okla. City*, 248 F.3d 1214, 1224 (10th Cir. 2001). Summary judgment is proper when "the pleadings, depositions, answers to interrogatories, and **admissions on file**, together with affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). "When applying this standard, we view the evidence and draw reasonable inferences therefrom in the light most favorable to the nonmoving party." *Camfield*, 248 F.3d at 1224 (quotation omitted). Because he is appearing pro se, we also interpret Rockefeller's pleadings generously. *Belhomme v. Widnall*, 127 F.3d 1214, 1216 (10th Cir. 1997).

We agree with the district court's analysis. Accordingly, we affirm the entry of summary judgment in favor of the Department for substantially the same reasons set forth in the memorandum opinion and order entered by the district court on March 21, 2002. In addition, we reject Rockefeller's claim that the district court erred in granting summary judgment without permitting him to engage in additional discovery. Under Fed.R.Civ.P. 56(f), Rockefeller was required

to file an affidavit in response to the Department's motion for summary judgment explaining to the district court why additional discovery was necessary before the court could rule on the motion. See *Price ex rel. Price v. W. Res., Inc.*, 232 F.3d 779, 783-84 (10th Cir. 2000). While Rockefeller referred to Rule 56(f) in his opposition to the Department's motion for summary judgment, see R., Doc. 38 at 1, he failed to file an affidavit in compliance with Rule 56(f), and he failed to explain to the district court why additional discovery was necessary. Moreover, Rockefeller had almost five months to conduct discovery under the district court's pretrial schedule, and, except for serving four requests for production of documents, he conducted no discovery.[2]

---

2 On March 20, 2002, one day before the district judge entered his order granting the Department's summary judgment motion, the magistrate judge granted a motion to compel filed by Rockefeller and directed the Department to produce certain phone records. See R., Doc. 55. Apparently, the magistrate judge granted Rockefeller's motion to compel because certain phone numbers he provided to the court matched phone numbers called by an employee of the Department during the relevant time periods. See id. At 2. However, even if the phone calls were in fact made by an employee of the Department, Rockefeller failed to allege sufficient facts to establish that the calls construed an adverse employment action. As a result, the district judge's entry of summary judgment was proper, regardless of the magistrate judge's ruling on Rockefeller's motion to compel. Further, Rockefeller's claim that the Department admitted certain matters by not responding to requests for admission he served on it in February 2002 is without merit since the discovery cut-off was in January 2002.

The judgment of the United States District Court for the District of New Mexico is AFFIRMED.

Entered for the Court
Robert H. Henry
Chief Judge

FILED
United States Court of Appeals
Tenth Circuit
FEB 5 2003
PATRICK FISHER
Clerk

APPENDIX 2

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRONMENTAL SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE, Doc. 59
UNITED STATES
DEPARTMENT OF ENERGY,
Plaintiff,

v. Civ. No. 01-399
JP/LCS - ACE

SPENCER ABRAHAM, in
his official capacity as
SECRETARY, UNITED STATES
DEPARTMENT OF ENERGY,
Defendant.

FINAL SUMMARY JUDGMENT

Having granted summary judgment to Defendant Spencer Abraham, in his official capacity as Secretary of the United States Department of Energy, by a Memorandum Opinion and Order entered contemporaneously with this final summary judgment.

IT IS HEREBY ORDERED that final summary judgment is entered in favor of Defendant Spencer Abraham, in his official capacity as Secretary of the United States Department of Energy, on all claims asserted in Plaintiff's Original Complaint; and Plaintiff's claims under the whistle-blower provisions of the Safe Drinking Water Act, the Toxic Substances Control Act, and the

Comprehensive Environmental Response, Compensation, and Liability Act, and Plaintiff's associated First Amendment claims are dismissed without prejudice; and all of Plaintiff's other claims are dismissed with prejudice.

s/James A. Parker

CHIEF UNITED STATES DISTRICT JUDGE

FILED
United States District Court
Albuquerque, New Mexico
MARCH 21, 2002
ROBERT M. MARCH
Clerk

FILED Contemporaneously
Document 58
MEMORANDUM OPINION AND ORDER

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
former ENVIRONMENTAL SCIENTIST,
WIPP SITE TEAM,
CARLSBAD AREA OFFICE,
UNITED STATES
DEPARTMENT OF ENERGY,
Plaintiff,

v.

SPENCER ABRAHAM, in
his official capacity as
SECRETARY, UNITED STATES
DEPARTMENT OF ENERGY,
Defendant.

Doc. 58

Civ. No. 01-399
JP/LCS - ACE

MEMORANDUM OPINION AND ORDER

On January 17, 2002, Defendant filed a motion for summary judgment (Doc. No. 35). Defendant's motion for summary judgment seeks to dismiss Plaintiff's Original Complaint (Doc. No. 1), which includes allegations of (1) retaliation in violation of Title VII, (2) violations of the whistle-blower provisions of the Toxic Substances Control Act (TSCA), the Safe Drinking Water Act (SDWA), and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), (3) violations of the federal regulations concerning the manner in which equal employment opportunity complaints are handled, and (4) violations of the United State's constitution. On March 19, 2002, after the parties had fully briefed the motion, the Court heard oral argument. Having considered the arguments, the facts, and the law, the Court will grant summary judgment on Plaintiff's Original

Complaint.

Standard

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). When applying this standard, the Court examines the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment. *Applied Genetics Intl, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir. 1990). The moving party bears the initial burden of showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). Only then does the burden shift to the non-movant to come forward with evidence showing that a genuine issue of material fact exists. *Bacchus Indus., Inc. v. Arvin Indus., Inc.*, 939 F.2d 887, 891 (10th Cir. 1991). The non-moving party may not avoid summary judgment by resting upon mere allegations or denials of his or her pleadings. *Id.* To withstand a motion for summary judgment, the non-movant must make "specific reference" to evidence in the record. *Gross v. Burggraf Const. Co.*, 53 F.3d 1531, 1546 (10th Cir. 1995); D.N.M.LR-Civ. 56.1(b) (placing similar burden on both parties). Unsubstantiated allegations, no matter how true they might be, cannot be considered. *Gross*, 53 F.3d at 1546.

Title VII Retaliation

Plaintiff maintains that after Plaintiff sought assistance from the equal employment opportunity office at the Department of Energy (DOE), Defendant began retaliating against him. The alleged retaliation consisted of 52 telephone calls to Plaintiff's home, which Plaintiff considers

harassment, and Plaintiff's inability to secure a new job after the DOE terminated his employment, which Plaintiff considers to be prima facie evidence that the DOE blacklisted him from future employment opportunities. Defendant denies all charges of retaliation.

The 52 Telephone Calls

Plaintiff asserts that during a period when Plaintiff was making public comments about potential safety violations at the DOE, he began receiving odd telephone calls. When Plaintiff would answer the telephone, he would be greeted with silence. Although Plaintiff attempted to have the calls traced, he never learned who was making the calls. Nonetheless, because some of the calls took place on the same days that Plaintiff brought his allegations of safety violations to public forums, Plaintiff attributes the calls to a retaliation campaign on the part of the DOE to harass and intimidate Plaintiff.

Plaintiff offers no specific evidence that any of the 52 calls were made by DOE employees. Even if he could create a genuine issue of material fact with specific evidence, such calls do not rise to the level of an adverse employment action upon which to build a Title VII retaliation case. Anderson v. Coors Brewing Co., 181 F.3d 1171, 1179 (10th Cir. 1999) ("While the calls were no doubt annoying, they do not amount to adverse employment action.").

Blacklisting

Although Plaintiff alleges that Defendant has prevented him from securing employment since his termination, Plaintiff offers no specific evidence that he was blacklisted by Defendant. Without some evidence (other than Plaintiff's unreasonable speculation) that his former colleagues at the DOE

somehow influenced a potential employer's decision not to hire Plaintiff, summary judgment is appropriate.

Whistle-blowing

Plaintiff asserts statutory causes of action under the whistle-blower provisions of SWDA, TSCA, and CERCLA. However, those Acts each require that a plaintiff file his whistle-blower complaint with the Secretary of Labor for administrative review before seeking judicial review. See 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 300j-9(i)(2)(A); 42 U.S.C. § 9610(b). At oral argument, Plaintiff conceded that he never filed an administrative complaint with the Secretary of Labor addressing these particular statutory claims. Therefore the Court will grant summary judgment on these claims, but without prejudice in order to provide Plaintiff with an opportunity to exhaust his administrative remedies in the event that they are not time barred.

The Court notes that the statutory provisions of SWDA and TSCA authorize judicial review of the Department of Labor administrative decisions by the circuit, not district, courts. See 15 U.S.C. § 2622(b)(1); 42 U.S.C. § 300j-9(i)(2)(A). Thus should Plaintiff exhaust his administrative remedies under SWDA or the TSCA, further judicial review of the administrative decisions should be directed to the Court of Appeals for the Tenth Circuit.

Handling of Plaintiff's EEOC Complaint

Plaintiff asserts that he can maintain a cause of action against Defendant because the EEOC counselor at the DOE initially refused to process his fifth EEOC complaint in October of 1999. Plaintiff admits that the same office accepted his complaint for processing in December 1999. However, Plaintiff claims that Defendant violated a

federal regulation that directs EEOC counselors not to "attempt in any way to restrain the aggrieved person from filing a complaint." 29 C.F.R. 1614.105(g). When asked by the Court, Plaintiff could demonstrate no damages from the delay in processing his complaint. Further, the law is clear that a violation of a federal regulation governing the handling of Plaintiff's EEOC complaint does not create an independent cause of action under Title VII. *Scheerer v. Rose State College*, 950 F.2d 661, 663 (10th Cir. 1991) ("The circuits which have addressed the issue have uniformly held that no cause of action against the EEOC exists for challenges to its processing of a claim."); *Jordan v. Summers*, 205 F.3d 337, 342 (7th Cir. 2000) (holding that once the claim was in federal court, the proper course of action for a plaintiff whose claim was mishandled "is to bring a lawsuit against the plaintiff's employer on the merits"). Because Plaintiff is in district court on the merits of his EEOC complaint, summary judgment is warranted on Plaintiff's claim that Defendant unlawfully restrained Plaintiff from filing an EEOC complaint.

Constitutional Violations

Plaintiff alleges that Defendant violated his rights under the First and Fifth Amendments to the United States constitution.[1] Defendant has argued, correctly, that Plaintiff has no recourse to allege discrimination under the Fifth Amendment because Title VII preempts Plaintiff's constitutional claims

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1 Although Plaintiff asserted violations of the Fourteenth Amendment's equal protection clause in his Original Complaint, Plaintiff conceded at oral argument that the Fourteenth Amendment does not apply to Defendant, a federal employer.

regarding discrimination. *Brown v. General Services Administration*, 425 U.S. 820, 832 (1976). To the extent Plaintiff may have alleged Fifth Amendment violations aside from discrimination, Plaintiff has not demonstrated that a genuine issue of material fact is in dispute.

Further, to the extent Plaintiff asserts First Amendment claims aside from his alleged retaliation for speaking with EEOC officials, such claims are similarly preempted by the whistle-blower statutes. *Cf. Bush v. Lucas*, 462 U.S. 367 (1983) (holding that administrative remedies available to federal employees were sufficient to preclude actions for claims based on the First Amendment retaliation). Because the whistle-blower provisions of TSCA, SWDA, and CERCLA are tailored to address the problems associated with free speech and workplace retaliation, the failure to prevail on the provided statutory remedy precludes a constitutional claim for damages. Otherwise, the congressional allocation of administrative and judicial decision-making "would be eliminated by the simple expedient of putting a different label on the pleadings." *Brown*, 425 U.S. at 833 (internal quotations and punctuation omitted). Thus, summary judgment is required on Plaintiff's constitutional claims. Because Plaintiff's alleged First Amendment claims are closely associated with his statutory whistle-blower claims they also will be dismissed without prejudice.

IT IS THEREFORE ORDERED that Defendant's Motion for summary judgment (Doc. No. 35) directed to Plaintiff's Original Complaint will be GRANTED. Given that the Court will grant summary judgment on Plaintiff's Original Complaint, the Court will dismiss Plaintiff's claims as follows:

(1) Plaintiff's allegations of Title VII retaliation involving telephone harassment and blacklisting will be dismissed with prejudice;

(2) Plaintiff's allegations of violations of the whistle-blower provisions of the SDWA, TSCA, and CERCLA will be dismissed without prejudice;

(3) Plaintiff's alleged cause of action based on Defendant's violation of federal regulations concerning the handling of EEOC complaints will be dismissed with prejudice;

(4) Plaintiff's allegations of constitutional violations of the Fifth Amendment to the constitution of the United States will be dismissed with prejudice;

(5) Plaintiff's allegations of constitutional violations of the First Amendment to the constitution of the United States will be dismissed without prejudice.

IT IS FURTHER ORDERED that any causes of action Plaintiff may be attempting to assert based on Defendant's conduct that occurred before Plaintiff's termination are barred by res judicata, and should have been pursued in Plaintiff's former suit alleging disability discrimination and Title VII retaliation, *Rockefeller v. Abraham*, Nos. 00-248 & 01-2054 (19th Cir. Nov. 15, 2001).

IT IS FURTHER ORDERED that all other pending motions are denied as moot. Additionally, the Court has considered Plaintiff's oral motion for reconsideration, which Plaintiff made at the hearing on March 19, 2002, along with Plaintiff's Statement of Alleged Defendant's Admissions in Civil Case No. 01-399 that Plaintiff tendered in open court, and denies Plaintiff's motion for reconsideration.

s/James A. Parker

CHIEF UNITED STATES DISTRICT JUDGE

APPENDIX 3

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO

TOD N. ROCKEFELLER,
Plaintiff,

vs.

Doc. 55

No. CIV 01-0399
JP/LCS

SPENCER ABRAHAM,
Secretary, United States
Department of Energy,
Defendant.

ORDER

THIS MATTER came before the Court on March 13, 2002, for a hearing on Plaintiff's Motion to Compel (Doc. 31), filed January 8, 2002. On March 14, 2002, I issued an Order denying the Motion as to Request for Production of Documents Numbers 1, 2, and 3, and taking the Motion under advisement as to Request for Production Number 4, pending submission and *in camera* review of the documents requested. Having reviewed the documents responsive to this request *in camera*, I find that the Motion with respect to Request for Production Number 4 should be GRANTED SUBJECT TO THE CONDITIONS SPECIFIED HEREIN.

In Request for Production Number 4, Plaintiff seeks production of records reflecting long distance calls made by DOE employee Ron O'Dowd for the period of August 1997 to August 2001. Plaintiff asserts that these documents are relevant to his blacklisting and harassment claims. A party may request production of documents that contain matters within the scope of Rule 26(b) and are in possession, custody or control of another party.

FED.R.CIV.P. 34(a). Rule 26(b), as amended, provides in pertinent part:

> Parties may obtain discovery regarding any matter, not privileged, which is *relevant to the claim or defense* of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. *For good cause*, the court may order discovery of any matter *relevant to the subject matter involved in the action.* Relevant information need not be admissible at trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

FED.R.CIV.P. 26(b)(emphasis added).

At the hearing of March 13, 2002, I directed Plaintiff to submit a list of area codes and exchanges that he believes would support his claim of blacklisting and harassment by March 19, 2002. Plaintiff has submitted such a list. Having reviewed the phone records and Plaintiff's list, I find that the numbers specified by Plaintiff on his list are relevant to his claims and discoverable under FED.R.CIV.P. 26(b). Defendant may redact all telephone numbers that do not contain the area codes and exchanges on Plaintiff's list from the telephone records. Defendant shall produce the redacted telephone records to Plaintiff by March 29, 2002. Plaintiff shall not call, or cause an agent to call, any telephone number so produced without motion and further order of the Court.

IT IS SO ORDERED. s/Leslie C. Smith
UNITED STATES MAGISTRATE JUDGE